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IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1936

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**No. 305**

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WAYNE UNITED GAS COMPANY, a corporation,

*Petitioner,*

*vs.* ) IN BANKRUPTCY.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

*Respondents.*

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**BRIEF OF OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS, OPPOSING PETITION FOR WRIT OF CERTIORARI.**

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**BRIEF OF OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS, OPPOSING PETITION FOR WRIT OF CERTIORARI.**

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### I.

### THE FACTS

On March 2, 1936, the District Court disapproved and dismissed petitioner's original and first amended

and supplemental petitions for reorganization, and ordered that the cause "be retired from the docket" with costs to the objecting creditors (respondents here). Petitioner applied to the Circuit Court of Appeals for a review of that order, under section 24(b) of the Bankruptcy statute. On April 15, 1936, the Circuit Court of Appeals denied the petition on the ground that said order was reviewable only by appeal under section 25(a) of the Act. The appeal period of thirty days provided for in section 25(a) had expired on April 1st. On April 16th petitioner executed and promptly served notice of its intention to file in the District Court its petition for a rehearing of the order of March 2nd. A petition for rehearing was filed on April 24th, pursuant to said notice. Notwithstanding that no grounds were assigned for the rehearing not theretofore considered, the Court vacated the order of March 2nd and allowed a rehearing. On May 28th the District Court again dismissed the petitions for reorganization, and again retired the cause with costs to the respondents.

The term (November, 1935) at which the order of March 2nd was entered, terminated on April 20, 1936. (R. 19).

Respondents contended, and contend now, that after the expiration of the appeal period and the close of the term, the District Court was without jurisdiction to set aside the order of March 2, 1936, or to grant a

rehearing; consequently, that the appeal allowed by the District Court on June 11, 1936, while in form an appeal from the order of May 28, 1936, was in legal effect an appeal from the order of March 2, 1936. The Circuit Court of Appeals sustained this contention and dismissed the appeal.

## II.

## THE ISSUE

The order of May 12, 1936, vacating the order of March 2, and granting a rehearing thereof, and the order of May 28, 1936, again disapproving and dismissing the petitions for reorganization, were entered subsequent to the end of the term and after the expiration of the appeal period. Was it beyond the power of the District Court to enter them? That is the only issue.

No case cited by petitioner involves facts analogous to those in this record.

## III.

## ARGUMENT

### (1)

*Petitioner's statement of the general rule of law and equity practice that a petition for rehearing may be filed and granted at any time within the term even though the period for appeal has expired, is correct, but does not apply to the facts and the issues in this proceeding.*

Respondents are in complete accord with the general principle stated and argued at page 10 of petitioner's brief that a petition for the rehearing of judgments at law and decrees in equity may be allowed at any time within the term even though the appeal period has expired. *The principle has no application to this proceeding.*

In law cases the source of this authority is the common-law power of the courts to control all orders entered at the term.[1]

In suits of equity, the authority is expressly given (in all cases where an appeal lies) by Equity Rule 69.

If a rehearing is granted within the term, the period for appeal begins to run from the final action of the

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[1] *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2d, 1915) 222 Fed. 22.

court, and not from the original order. This is the rule laid down in the cases cited by petitioner at pages 10-12 of its brief, with which the respondents have not taken issue in this case.

The case of *Todd* v. *Alden* (C. C. A. 8th, 1917) 245 Fed. 462, cited by petitioner at page 13 of its brief does not support its contention. For all that appears, the petition for rehearing was filed promptly after the entry of the order dismissing the claim, and the Circuit Court of Appeals held that the appeal period ran from the entry of the final, not the original, order.

(2)

*The Circuit Court of Appeals correctly held that the period for rehearing was limited to the statutory period for taking an appeal.*

Predicating its position upon the general rule of law and equity practice that a rehearing may be granted at any time either before or *after the appeal period* if *within the term*, petitioner's argument is essentially as follows:

*Premise*: A rehearing may be granted at any time before or *after the appeal period if within the term.*

*Proposition*: In bankruptcy, there are no terms. (Thus eliminating the second condition of the premise.)

*Conclusion*: There is no definite limitation upon the time within which a rehearing may be granted in bankruptcy proceedings.[2]

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[2] Petitioner now asserts that the application must be "seasonably" made, and before the rights of others shall have become vested. As used by petitioner, the word "seasonably" has no meaning whatever. Moreover, a bankruptcy court would not hesitate to approve the filing of a petition for reorganization on the ground that the subsequent disposition thereof might involve the consideration of vested rights.

The Circuit Court of Appeals rejected this contention holding that the statutory provision limiting the appeal to thirty days placed a like limitation on the period within which a rehearing could be granted. In so doing, the Court did not lay down a rule for actions at law or suits in equity. It had declared the principle applicable to such proceedings in earlier cases, notably *McIntosh* v. *United States* (C. C. A. 4th, 1934) 70 F. (2d.) 507, *cert. denied*, 293 U. S. 586. It was dealing with a bankruptcy proceeding and its statement of the law was limited to the facts before it.

It has been many times emphasized by this Court that a speedy determination of the cause is of the very essence of a proper administration of the bankruptcy law. "The act is filled with provisions for quick and summary disposal of questions,"[3] clearly indicating that its spirit and purpose is to accelerate, and not to impede, the disposition of proceedings thereunder. Bankruptcy is a statutory creation and bankruptcy proceedings are governed entirely by the statute. It makes no general provision for rehearings. It makes ample provision that proceedings thereunder shall be disposed of with celerity.

Underlying the rule of law and equity practice that rehearings may be allowed within the term is the principle that until the close of the term, a judgment or decree remains within the breast of the court and

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[3] *Bailey* v. *Glover*, 21 Wall. (U. S.) 346.

subject to its control. The problem before the Circuit Court of Appeals in this case was to determine when a judgment or decree ceases to be within the control of the District Court in proceedings where, according to the general rule and *accepting petitioner's contention*, there are no terms. The Court found the answer in the appeal provisions of the statute. After thirty days an order reviewable under section 25 (a) and not appealed can not be reviewed. For the purpose of appeal, it is a finality. The Circuit Court of Appeals held that this statutory finality was intended to be decisive of the rights of the parties, and that it was not intended to be circumvented weeks, months, or years later by a rehearing for which the Act makes no provision.

Being of this opinion, the Circuit Court of Appeals below disposed of the case as follows:

> "We are of opinion that the Court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order."

In this view the Court was fully supported by the three decisions cited in the *per curiam* opinion. Petitioner asserts that in two of these cases[4] the rehearing

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[4] *Bonner* v. *Patterf*, (C. C. A. 10th, 1931) 47 F. (2d) 852;
*United States* v. *East* (C. C. A. 8th, 1935) 80 F. (2d) 134.

At page 18 of its brief petitioner takes the position that the decision of the Circuit Court of Appeals in this case rests upon a finding that the actual purpose of the rehearing was to revive the right of appeal. If petitioner's interpretation of the opinion be correct, the correctness of the decision will not be reviewed by a writ of certiorari. See *Post*, point (3) of Argument.

was resorted to for the purpose of restoring the expired right of appeal, but however that may be, the appellate courts in each instance definitely recognized the *lack of power* in the District Court to rehear orders appealable under section 25(a) after the expiration of the appeal period.

> "If it be considered in the nature of a petition for rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late." *Bonner* v. *Potterf, supra.*

> "* * * the right of the United States to appeal from the order was lost to the government by its failure to take an appeal within the thirty days fixed by the statute. The proceedings by which it was attempted to extend time of appeal were ineffectual to that end. *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128;" (and other cases.) *United States* v. *East, supra.*

The opinion of *Circuit Judge Page*, speaking for the Circuit Court of Appeals for the 7th Circuit, is the most adequate discussion of the subject in the reports. After referring to the emphasis which this Court has laid upon expedition in bankruptcy cases, the opinion reads:

> "The early and final determination of the three appealable matters specified in Section 25-a is of vital importance, if the administration of estates in bankruptcy is to be accomplished within any reasonable time.

> "We are of opinion that the judgments that may be appealed from under the provision of section 25-a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within 10 days,[5] they may not be disturbed except under the provisions of section 57-k."[6]
>
> *In re Stearns & White Co.* (C. C. A. 7th, 1924) 295 Fed. 833.

Examination of these authorities discloses that the courts have been influenced in their views by the statements of this Court in the case of *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141.

Counsel for petitioner attempt to minimize the significance of the Conboy decision. They emphasize that the rehearing in that case was applied for and *denied*, and that the Court specifically reserved for decision the question whether a rehearing could have been *granted* after the appeal period and the effect, if it had been. While the decision of the particular point was reserved, the important considerations which

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[5] As drafted in Act of July 1, 1898, Ch. 541, 30 Stat. 553, section 25 (a) required that the appeal be taken within ten days. By the Act of May 27, 1926, Ch. 406, Sec. 10, 44 Stat. 665, the period was extended from ten to thirty days.

[6] Section 57 (k) (U. S. C. Title 11, Sec. 93) provides: "Claims which have been allowed in whole or in part may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

According to petitioner's contention, this legislative enactment is mere surplusage.

would be weighed in arriving at such a decision were clearly stated; namely, "the terms and spirit of the Bankruptcy Act."[7] Respondents respectfully assert that the terms and spirit of the Bankruptcy statute find full reflection in the decision of the Circuit Court of Appeals in this proceeding.

The decisions relied upon by petitioner are not persuasive. In *Cameron* v. *National Surety Co.* (C. C. A. 8th, 1921) 272 Fed. 874, the Circuit Court of Appeals pointed out specifically that the order appealed from did not refer in any way to the original order of adjudication, but was "an independent order made upon the pleadings and proofs." So considered, it did not present for determination the correctness of the original order of adjudication in bankruptcy or the subsequent order vacating the same. The validity of prior orders was not in issue. Not so here. The order of May 28, 1936, was expressly a disposition of the issues arising in the proceedings upon rehearing.[8] Its validity, upon motion to dismiss, depends entirely upon

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[7] "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect if it had been, we are not called upon to discuss."

*Conboy* v. *Jersey City Fidst Nat'l. Bank, Supra.*

[8] "* * * and thereupon this cause came on for further hearing and for a rehearing of all matters arising in this proceeding, pursuant to the petition and motion of the Debtor file herein on April 24, 1936, and to the order entered herein on April 24, 1936, and to the order entered herein on the 12th day of May, 1936, granting the rehearing and review prayed for as aforesaid and setting said cause down for hearing at this time." (Order of May 28, 1936, R. 20.)

the validity of the order vacating the order of March 2, 1936, and granting a rehearing thereof.

The decision in *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2d, 1915) 222 Fed. 22, has no bearing here. There the estate had been closed and the trustee discharged, and the case was reopened and a new trustee appointed under the authority of the express language of section 2 of the Bankruptcy Act providing for the reopening of an estate where it is made to appear that it has been closed without being fully administered.[9]

In *West* v. *McLaughlin & Co., Trustees* (C. C. A. 6th, 1908) 162 Fed. 124, the court approved the reconsideration after the appeal period of an order rejecting a claim in excess of $500.00. The decision apparently rests upon a misconception of the holding of the same court in the earlier case of *In re Ives* (C. C. A. 6th, 1902) 113 Fed. 911, also cited by petitioner. In the latter case, a creditor filed a petition to vacate the adjudication of a voluntary bankrupt. Said petition was filed more than ten days after the order of adjudication. The court held that the creditor had no

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[9] "But the principle we are discussing is not applicable in such cases, as the matter is governed by the express provisions of the Bankruptcy Act. That Act confers jurisdiction upon the District Courts as courts of bankruptcy, and provides in section 2, subdivision 8, that they shall have the power 'to close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered'." (222 Fed. at page 26.)

right to oppose the adjudication by appeal, motion to vacate, or in any other manner. Consequently, the right to grant a rehearing after the appeal period was not an issue. The general language in the opinion that "the proceedings in a pending suit" are at all times open for reexamination is correct in so far as it goes, but was not relevant to that decision and does not reach the question involved in this case.

The cases cited by petitioner do not cast serious doubt upon the correctness of the clearly defined decision of the Circuit Court of Appeals in this proceeding.

(3)

*If, as petitioner asserts, the decision of the Circuit Court of Appeals was controlled by the conclusion that the rehearing was granted solely to revive the right of appeal, certiorari should be denied.*

It is an abuse of power for a Court at any time to grant a rehearing merely for the purpose of making possible an appeal, and all proceedings pursuant to such a rehearing are void. This is true whether the rehearing be granted before the expiration of the appeal period for the purpose of extending the same[10] or after the appeal period for the purpose of reviving it.

[10] *In Re L. H. Seifer & Sons, Inc.* (C. C. A. 7th, 1935) 78 F. (2d) 196, cert. denied, 296 U. S. 618.

Petitioner (page 19) says that apparently it was the conclusion of the Circuit Court of Appeals that such was the purpose of the rehearing here.

If petitioner's interpretation of the *per curiam* opinion be correct, there clearly is no ground for a review by this Court. Certainly there is no ground for a writ of certiorari which ordinarily may not be invoked to review findings of fact.

The record amply sustains the view that the rehearing was sought and allowed for the express purpose of permitting the petitioner to save itself from the position in which it had been placed by attempting to secure a review under section 24(b) instead of taking an appeal within thirty days under section 25(a).

This conclusion is borne out by numerous circumstances, certain of which may be summarized as follows:

(1) Petitioner did not seek a reconsideration of the order of March 2nd within the appeal period of thirty days. It took no step toward applying for a rehearing until April 16th, the day following the dismissal of the petition for review under section 24(b). (R. 4.)

(2) Every relevant allegation in the petition for rehearing and accompanying assignments of

error (R. 6-17) was raised directly in the original and first amended petition for reorganization and disposed of in the order of March 2nd.

(3) The only new matter appearing in the petition for rehearing was the reference to the unsuccessful attempt to secure a review of the order of March 2nd under section 24(b) of the Bankruptcy Act. The petition stated that the reference to said attempted review "may not be relevant," but was included so that "the Court may be fully advised." The only apparent purpose of so advising the Court was to procure, if possible, a restoration of the right of appeal under section 25(a).

(4) While the order granting the rehearing recites that it was for good cause shown, the petition and assignments of error are devoid of any new ground or cause for further consideration of the petitions for reorganization other than the irrelevant statements concerning the unsuccessful petition for review under section 24(b). The minor amendments to the proposed plan of reorganization *subsequently* included in the second amended petition for reorganization *were not set out in the petition for rehearing* and therefore could not have been the basis for granting the rehearing.

Moreover, these amendments were unrelated to the basic finding of the District Court that the plan of reorganization was not feasible, in disregard of the fundamental rights of the holders of the first mortgage bonds, and that the petitions were not filed in good faith.

(5) The ten separate findings made by the Court in the order of May 28th were a mere elaboration of the conclusions stated in the order of March 2, 1936. To illustrate, in the order of March 2nd, the Court made the general finding that the petitions did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds. In the order of May 28, 1936, the Court was more specific, stating that the properties of the petitioner were of inadequate value to pay off $1,900,000 of first mortgage obligations outstanding, and that despite this inadequacy the petitions for reorganization proposed to keep in effect provisions of the mortgage indenture by which a portion of the corpus of the mortgaged property would be applied to the payment of obligations other than first mortgage bonds.

(6) Petitioner's assertions in the brief that the District Court gave "mature" consideration to the matter "for three weeks" is pure con-

jecture. All that the record shows is that the petition for rehearing was filed during the first week of the April term, and three weeks later, after argument, the rehearing was granted.

If, as petitioner suggests, the Circuit Court's dismissal of the appeal was controlled by the conclusion that the rehearing was for the purpose of restoring the right of appeal, it cannot be said that such conclusion is not well supported in the record. The statement that the Court must have "attached controlling weight" to the single fact that the ultimate result was the same as at the first hearing is not sustained by the facts.

(4)

*The District Court had no jurisdiction to set aside and rehear the order of March 2nd after the end of the term at which it was entered.*

The order of March 2, 1936, disapproved and dismissed the petitions for reorganization and retired the cause from the docket. The term ended on April 20, 1936. Petitioner has cited no authority, and respondents believe that none can be cited, to support the view that the control of said order of dismissal remained in the Court after the close of the November, 1935, term. Petitioner's entire case on this point rests

on the generalization that "there are no terms in bankruptcy." This generalization is based upon an erroneous enlargement of the rule laid down by this Court that in a "pending suit" and "during the progress of the cause" a bankruptcy court is always open and has no separate terms."

The guiding principle is that in bankruptcy proceedings the Court is always open from the beginning to the close of the case, regardless of terms. It by no means follows, however, that after a case has been disposed of and retired, the same principle applies. If petitioner's view were accepted, parties could place no faith upon the dismissal of proceedings and there would be no finality to such orders. The petition for reorganization having been dismissed, the assets and properties of the petitioner remained in its control and custody, subject to the claims of creditors. Thereafter, the bankruptcy court had nothing to do with such properties. It cannot reasonably be contended that control of the order of dismissal remained with the Court after the term.

This view is supported by the opinion in *In re Glory Bottling Co. of New York, Inc.* (C. C. A. 2d, 1922) 283 Fed. 110, where an involuntary petition having been dismissed with costs, the petitioning creditors some months later made a motion to vacate and for a re-

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11 *Sandusky* v. *National Bank*, 23 Wall. 289, 293.

hearing. The order of the District Court granting the rehearing was reversed by the Circuit Court of Appeals. The latter Court pointed out that after the dismissal of the petition, the debtor was in the same position as any other person or corporation doing business unembarrassed by the bankruptcy court. There was no case pending before the court, and no proceeding was in progress. In respondents' view, none of the authorities sustaining the doctrine that the court is always open in a pending bankruptcy proceeding have any pertinency to this case.

## CONCLUSION

Petitioner devotes the greater part of its brief to the proposition that the Court's *power* to grant a rehearing did not expire with the appeal period. On that proposition petitioner is not supported by the spirit of the Bankruptcy Act or by the decisions.

If, as petitioner asserts, the decision rests upon the finding that the true purpose of the rehearing was to restore the right of appeal, the case clearly is not one which calls for the issuance of a writ of certiorari.

To what extent the Circuit Court of Appeals gave weight to the point that the cause had been retired from the docket at the preceding term, the opinion does not clearly show. In respondents' view, that proposition alone would foreclose any relief to the petitioner on this record.

The granting of the writ would further delay the respondents in the enforcement of their undoubted rights as holders of first mortgage bonds. At the same time, no ultimate relief can be afforded the petitioner on the record.

No important question of general law is involved and on this record, petitioner cannot be interested in the settlement of any such question. The findings of the District Court warrant the conclusion that the only interest of the petitioner is to delay the respondents in the enforcement of their legal rights.[12]

For the reasons herein stated respondents assert that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1936.

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[12] Default in payment of interest and sinking fund occurred in June, 1932. For a history of the litigation by which the bondholders have been delayed in the enforcement of their claims, see: *Bell* v. *Wayne United Gas Co.* (W. Va. 1935) 181 S. E. 609.